IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 50 OF 2001.

Mr. Raj Kumar @ Raj Auchok
s/o Arun Kumar, r/o Old
Fort, Leh, Jammu & Kashmir,
Bangri, Manali, Himachal
Pradesh. ... Appellant.

Versus

The State. ... Respondent.

Mr. G.M. Kanekar with Miss Rasika Harji and Miss Sita Fernandes, Advocates for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent State.

Coram : P.V. HARDAS, J.

Date : 20th June 2003.

ORAL JUDGMENT.

The appellant/accused has filed this appeal challenging his conviction for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act and the sentence of rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default simple imprisonment for one year, passed by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No. 14 of 2000, by Judgment, dated 31st August 2001.

2. The facts as are necessary for the decision of the appeal are set out hereunder:-

In January 2000, P.W.4 P.S.I. Sandesh Chodankar was the Officer in-charge of Anjuna Police

Station. On 2nd January 2000, at about 7.30 p.m., P.W.4 P.S.I. Chodankar alongwith three other policemen went on patrolling duty at Anjuna-Vagator. They had carried with them weighing, packing material, etc.. When they reached near the Hill Top Hotel, they noticed some motorcycles, which were parked. Outside the hotel one person wearing blue jeans and T-shirt with a stout built was seen giving some thing to a foreigner and the foreigner in turn giving some money to the said person. P.W.4 P.S.I. Chodankar immediately suspected that the said person was selling drugs and, therefore, surrounded the said person, whom, P.W.4 P.S.I. Chodankar identified in the Court as the accused. Thereafter presence of two panchas, namely, P.W.3 Satchit Shridhar Naik and Pratap Calangutkar was secured. P.W.4 P.S.I. Chodankar then explained to the panchas that he was suspecting the said person to be selling drugs and was in possession of drugs and, therefore, the accused was required to be searched. On being asked by P.W.4 P.S.I. Chodankar, the accused informed that his name was Raj Kumar Auchok. P.W.4 P.S.I. Chodankar then informed the accused that he was suspecting him for possessing drugs and, therefore, wanted to take his search. An offer was given to the accused that he could be searched either before a Gazetted Officer or a Magistrate. The accused declined the said offer and gave it in writing. The said writing is at Exhibit P.W.4/A. The accused was

also given an offer to search the members of the raiding party including the panchas, which the accused declined. On the personal search of his shoes, 5 bundles of black substance, which were tied together by a red tape, were found. Three bundles were found in one shoe and two bundles were found in the other shoe. On weighing it was found to weigh 450 grams. It was then put in a polythene bag, thereafter in an envelope and packed and sealed with the seal of the Anjuna Police Station. The particulars were written on the envelope and the signatures of the panchas and that of the accused and P.W.4 P.S.I. Chodankar were obtained on the envelope. In the left side pant pocket, cash of Rs. 4,420/- and one $ 5 note, one identity card and a driving licence were found. The money and the other articles were similarly packed and sealed. The socks and shoes of the accused were also packed and sealed. The panchanama of the entire sequence of events was drawn and the same is at Exhibit P.W.4/A. The seizure report is at Exhibit P.W.4/B. Since the accused was not having any legal documents for possession in respect of the drugs, the grounds of arrest were explained to the accused and he was taken into custody. The accused was then brought to the Anjuna Police Station where P.W.4 P.S.I. Chodankar lodged a complaint at Exhibit P.W.4/C. The drugs which were seized were then deposited by P.W.4 P.S.I. Chodankar with the godown keeper P.W.6 Ganpati Vadkar.

The receipt of the deposit of the property is at Exhibit P.W.4/D. Thereafter P.W.4 P.S.I. Chodankar sent the intimation under Section 57 to the Superintendent of Police, which is at Exhibit P.W.4/E. The attached drugs were then sent to the Crime Branch for onward transmission to the laboratory alongwith the specimen seal letter, which is at Exhibit P.W.1/B.

3. The seized drugs were received by P.W.2 Manohar D. Joshi who has acknowledged the receipt of the seized drugs. The seized drugs were kept by P.W.2 Manohar in a sealed cupboard and, thereafter, were forwarded to the Director, Food and Drugs Administration, Panaji, on 3rd January 2000, through H.C. B. No. 1756.

4. The drugs were then analysed by P.W.1 Mahesh Kaissare, who, as per his report at Exhibit P.W.1/C, opined that the drugs analysed by him contained charas.

5. After completion of the investigation a charge-sheet against the appellant/accused came to be filed. The learned Special Judge, vide Exhibit 5, framed a charge against the appellant/accused for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act. The prosecution in support of the charge examined 6 witnesses. P.W.5 is Deputy Superintendent of

Police Arvind Gawas, who speaks about the receipt of intimation under Section 57 of the N.D. P.S. Act. P.W.6 is Ganpati Vadkar, who, at the relevant time, was in-charge of the godown and in whose safe custody the seized drugs were kept. The appellant/accused also examined one defence witness D.W.1 Madhusudhan Marodkar, in order to establish that the seized drugs could not have been kept in the shoes as alleged by the prosecution. The trial Court, on consideration of the entire evidence, found that the appellant/accused was guilty and, accordingly, convicted and sentenced him. Hence, the present appeal.

6. P.W.1 Mahesh refers to the specimen seal letter at Exhibit P.W.1/B, which is dated 3rd January 2000. According to him, on comparison of the seals fixed on the parcel with the specimen seals, he found the seals to tally and, therefore, proceeded to analyse the samples. He has stated that there were 7 seals on the packet. P.W.2 Manohar in his cross-examination admits that the packet had 8 seals.

7. P.W.3 Satchit states that he was requested by the police to act as a panch on 2nd January 2000. According to him, he was plying his taxi at Vagator from where he was called at the Hill Top Hotel. He states that the P.S.I. there had informed him that one person

was selling drugs and he wanted to take the search of the said person for drugs. According to P.W.3 Satchit, P.S.I. told the accused that he had a right to be searched before a Gazetted Officer or a Magistrate. However, the accused declined the said offer. The accused was also given the offer to search the members of the raiding party, which offer was declined by the accused. The accused had given in writing that he did not want to be searched either before a Gazetted Officer or a Magistrate. He then states on the personal search of the accused, the P.S.I. found some pieces, which were suspected to be charas, in the shoes of the accused. The said pieces of charas were weighed and found to weigh 450 grams. They were then put in a polythene bag and, thereafter, packed and sealed in an envelope. The signature of the panchas, P.S.I. and accused were obtained on the said envelope. The shoes and socks of the accused were also packed and sealed. On the left side pant pocket the police found Rs. 4,420/-, a $ 5 note, a licence and identity card, which were sealed similarly. He states that a panchanama of the entire sequence of events was drawn, which bears his signature and is at Exhibit P.W.3/A. In the cross-examination he has admitted that each stick in the bundle was wrapped in a polythene paper. He does not remember how many seals were put, but, on being shown the envelope, he admits that there were 7 seals. He

also admits that the writing on the envelope was done at the spot.

8. In the cross-examination he has admitted that the bundles of charas were not in the shoes but inbetween the socks and the shoes at the bottom. He has further admitted in the cross-examination that he knows P.W.4 P.S.I. Chodankar for last one and half years. He has admitted that besides this case, he has acted as panch in one more N.D.P.S. case and was also a panch in one unnatural death case. He has admitted that in the N.D.P.S. case, in which he has acted as a panch, the Investigating Officer was P.W.4 P.S.I. Chodankar. He has also admitted that in the unnatural death case, in which he was a witness, the Investigating Officer was P.W.4 P.S.I. Chodankar. He has also admitted that he was a panch witness in Crime No. 3/99 under Sections 354 and 376, which was investigated by P.S.I. Chodankar. Similarly he has admitted that he was a panch for an identification parade in Crime No. 33/99, in which P.S.I. Chodankar was the Investigating Officer. He admits that after the sealing was over P.W.4 P.s.I. Chodankar took the seal. He has denied the suggestion that he has not acted as a panch and had signed the panchanama in order to oblige the police.

9. P.W.4 P.S.I. Chodankar speaks about recovery

of 3 bundles of charas from one shoe and 2 bundles of charas in the other shoe. In the cross-examination he has admitted that he was knowing P.W.3 Satchit since last about one and half years. He has admitted that he has taken Satchit Naik as a panch witness in two N.D.P.S. cases. He has also admitted that Satchit Naik was a panch in one accidental death case. He has also admitted that P.W.3 Satchit was a panch for the identification parade. He has admitted that wife of P.W.3 Satchit is a lady police constable at Anjuna Police Station. He has denied the suggestion that Satchit was a stock witness of the police. He denied the suggestion that he had tampered with the seals put on the packets containing the seized drugs. Similarly he has denied the suggestion that a different sample was sent for analysis.

10. The evidence of P.W.6 Ganpati is very interesting. He states that on 2nd January 2000 P.S.I. Chodankar had deposited with him three sealed packets for safe custody and, accordingly, issued a receipt, which is at Exhibit P.W.4/D. In the cross-examination he has admitted that on the next day P.W.4 P.S.I. Chodankar had collected the packet of charas. He admits that the time of taking the packets is not mentioned in the register. He denied the suggestion that he had deposed falsely about the deposit of the packet by P.W.4

P.S.I. Chodankar.

11. Mr. Kanekar, the learned counsel appearing on behalf of the appellant/accused, has urged before me that P.W.4 P.S.I. Chodankar had not deposited the seal which he had affixed on the samples either with P.W.6 Ganpati or with the P.I. of the Police Station. According to the learned counsel, P.W.4 P.S.I. Chodankar has made no reference at all about the deposit of the seal with the P.I. of the concerned Police Station. He has further urged before me that the specimen seal letter was prepared on the next day and, therefore, the seal was in possession of P.W.4 P.S.I. Chodankar after he had sealed the packets and till the packets were sent for analysis. According to the learned counsel, there is no explanation whatsoever as to why the specimen seal letter was prepared on the next day. It is also urged before me that the carrier has not been examined by the prosecution. According to the learned counsel for the appellant/accused, therefore, the entire prosecution case comes under a cloud and the prosecution has not been able to prove that what was seized from the accused was ultimately sent for analysis. It has been further urged before me that taking into consideration the defence evidence, the prosecution case at the very threshold, that charas was found in the shoes of the appellant/accused, becomes

extremely doubtful.

12. It is true that P.W.3 Satchit and P.W.4 P.S.I. Chodankar have stated that 5 bundles of charas were recovered from the shoes of the appellant. P.W.1 Mahesh in the cross-examination has admitted that each bundle of charas was about 5" in circumference. The evidence of D.W.1 Madhusudhan, if perused, reveals that the shoes which were seized from the accused did not have any false cavity. The shoes were of hard leather and, therefore, were not stretchable. On being shown the bundles of charas, D.W.1 Madhusudhan opined that if three bundles are inserted in one shoe, the foot will not go inside the shoe. In the cross-examination he has denied the suggestion that the bundles of cylindrical pieces would fit inside the shoe. He has admitted that he has not received any summons from the Court, but was brought to Court by the Advocate for the accused. He has admitted that he knows the Advocate for the accused as he had made shoes for him.

13. The prosecution case as is apparent from the panchanama at Exhibit P.W.3/A is that the charas was found in the socks worn by the accused. Even in the complaint, which is at Exhibit P.W.4/C, which is signed by P.W.4 P.S.I. Chodankar, it is stated that charas was found in both the socks worn by the appellant/accused.

P.W.3 Satchit in his cross-examination has admitted that the bundles were not found in the shoes, but inbetween the socks and the shoes at the bottom. It is, thus, apparent that the prosecution was not vigilant in establishing before the Court that the charas was recovered from socks worn by the accused and not from the shoes. It appears that the witnesses have used the term 'recovered from the shoes' loosely and have not specifically deposed about the recovery of charas from the socks. This discrepancy, according to me, is extremely minor and on that count, the version of the prosecution cannot be jettisoned completely.

14. In this case, curiously, there is no evidence at all that the seal which had been affixed to the sealed property had been deposited by P.W.4 P.S.I. Chodankar. In his testimony P.W.4 P.S.I. Chodankar makes no reference at all to the deposit of the seal either with the P.I. of the Police Station or with P.W.6 Ganpati. Similarly P.W.6 Ganpati does not refer to the seal being deposited by P.W.4 P.S.I. Chodankar. The sealed packet was handed over by him on the next day to P.W.4 P.S.I. Chodankar. The letter of specimen seal impression was scribed on the next day, that is, on 3rd January 2000. Thus, on 3rd January 2000, P.W.4 P.S.I. Chodankar had in his possession both, the sealed packet as well as the seal, which had been affixed, on the said

packet. In the present case even the carrier has not been examined. Deposit of seal by the Investigating Officer after the sealing is over is of paramount importance. The specimen seal letter should invariably be prepared on the same day. The deposit of the seal alongwith the sealed packet, therefore, then lends an assurance to the Court that the sample which was analysed by the Analyser is the same that was seized from the accused. If the seal remains in the possession of the Investigating Officer and there is no satisfactory evidence that there was no possibility for the sample to have been tampered with, the mere tallying of the seals is of no significance. In the present case, in the peculiar circumstances of the case, in the absence of any evidence regarding the deposit of the seal, and, in fact, in the face of positive evidence that the seal remained with P.W.4 P.S.I. Chodankar when he had received the sealed packet from P.W.6 Ganpati, according to me, the possibility of tampering cannot be excluded.

15. My attention is invited to the Judgment of the learned Single Judge of this Court in **Koyappakalathil Ahamed Koya v. A.S. Menon and another**, 2002 CRI.L.J. 4502, wherein it was observed as under:-

> "49. Mr. Thakur and Gadkari submitted that norcotic drug has been properly stored in proper custody and there has been no infringement of important provisions of NDPS Act. It is the

submission of the defence counsel that the seal was permitted to be in the custody of Menon who was having the custody of the sample packets as well as the remaining packet and, therefore, he had ample opportunity of tampering with the contents of those packets. Mr. Thakur and Mr. Gadkari submitted that Shri Menon has been authorised to have the custody of such drugs after seizure in view of the powers granted to concerned authority by provisions of NDPS Act. Be that as it is, but one thing has to be avoided and that is that the person who is having the custody of sample packets and remaining packet which is to be presented before the trial Court should not have the custody of the seals. By following such practice, the possibility of anybody tampering with the sample packet and the remaining packet cannot be overruled. NDPS Act has taken special care by pointing out that after the seizure has been effected, in normal course, the narcotic drug should be handed over in the custody of officer incharge of the nearest police station and he has to affix his own seal to those packets in addition to the seals used by the members of the raiding party affixed at the time of such seizure along with the panchanama. Therefore, the officer having the custody of sample packets and remaining packet should not have the custody of the seals which have been used by the members of the raiding party while effecting the seizure and drawing the panchanama. It is to be noted that in the Prevention of Food Adulteration Act, Bombay Prohibition Act at the time of sending the samples to Chemical Analyst, ballistic experts, precaution is always taken to see that such expert should get the samples as well as a forwarding letter bearing a specimen of seal impressed on the samples sent to him for examination separately. These expressions of specimen seals are to be sent separately and those experts are expected to compare those seals by satisfying themselves that the seals are in tact and no interference has been done with them. For the purpose of ensuring this safeness and

> credibility of the reports of such experts, maximum care has to be taken because in cases the reports of such experts are allowed to be admitted in evidence without such experts being examined. When the sentence provided is severe, the system should be beyond suspicion and above board."

16. Therefore, in my considered opinion, the appellant/accused is entitled to be given the benefit of doubt and the appeal must succeed.

17. In the result the Criminal Appeal is allowed. The conviction of the appellant/accused for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act and the sentence of rigorous imprisonment of ten years and fine of Rs. 1 lakh in default simple imprisonment for one year as passed by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No. 14 of 2000, is, hereby, quashed and set aside and the appellant/accused is acquitted of the aforesaid charge. The appellant/accused shall be released forthwith, if not wanted in any other case.

(P.V. HARDAS)
JUDGE.

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